

TRANSCRIPT OF PROCEEDINGS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of:

Herring Broadcasting, Inc.

v

Time Warner Cable, Inc, et al.

MB Docket No. 08-214



ORIGINAL

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TELEPHONE (202) 234-4433

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of: MB Docket No. 08-214

HERRING BROADCASTING, INC.
D/B/A WEALTHTV,
Complainant, File No. CSR-7709-P
v.

TIME WARNER CABLE, INC.
Defendant.

HERRING BROADCASTING, INC.
D/B/A WEALTHTV,
Complainant, File No. CSR-7822-P
v.

BRIGHT HOUSE NETWORKS, LLC,
Defendant.

HERRING BROADCASTING, INC.
D/B/A WEALTHTV,
Complainant, File No. CSR-7829-P
v.

COX COMMUNICATIONS, INC.,
Defendant.

HERRING BROADCASTING, INC.
D/B/A WEALTHTV,
Complainant, File No. CSR-7907-P
v.

COMCAST CORPORATION,
Defendant.

VOLUME 9

Monday, April 20, 2009
10:00 a.m.

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The Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
Hearing Room TW-A363

BEFORE:

RICHARD L. SIPPEL,
Chief Administrative Law Judge

APPEARANCES:

On Behalf of Herring Broadcasting, Inc. d/b/a
WealthTV:

KATHLEEN WALLMAN, ESQ.
Of: Kathleen Wallman, PLLC
9332 Ramey Lane
Great Falls, VA 22066
(202) 641-5387

JOSHUA ROSE, ESQ.
Of: Rose & Rose, PC
1320 19th Street, NW
Suite 601
Washington, DC 20036
(202) 331-8555
FAX (202) 331-0996

HAROLD FELD, ESQ.
Of: Strength to Strength Develop-Ed, LLC
1419 Noyes Lane
Silver Spring, MD 20910
(301) 602-7341

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On Behalf of Time Warner Cable Inc.:

JAY COHEN, ESQ.

GARY CARNEY, ESQ.

SAMUEL E. BONDEROFF, ESQ.

Of: Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019-6064
Cohen - (212) 373-3163
Carney - 3051
Bonderoff - 3222
Cohen - FAX (212) 492-0163
Carney - FAX - 0051
Bonderoff - FAX - 0222

ARTHUR H. HARDING, ESQ.

Of: Fleischman and Harding LLP
1255 23rd Street, NW
Eighth Floor
Washington, DC 20037
(202) 939-7900
FAX (202) 939-7904

On Behalf of Bright House Networks LLC:

R. BRUCE BECKNER, ESQ.

Of: Fleischman and Harding LLP
1255 23rd Street NW
Suite 800
Washington, DC 20037
(202) 939-7913
FAX (202) 387-3467

On Behalf of Cox Communications, Inc.:

DAVID E. MILLS, ESQ.

LYNN M. DEAVERS, ESQ.

Of: Dow Lohnes PLLC
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036-6802
Mills - (202) 776-2865
Deavers -2408
Mills - FAX - (202) 776-4865
Deavers - FAX -4408

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On Behalf of Comcast:

DAVID H. SOLOMON, ESQ.
L. ANDREW TOLLIN, ESQ.
CRAIG EDWARD GILMORE, ESQ.
J. WADE LINDSAY, ESQ.

Of: Wilkinson Barker Knauer, LLP
2300 N Street, NW
Suite 700
Washington, DC 20037
(202) 783-4141
FAX (202) 783-5851

MICHAEL D. HURWITZ, ESQ.

Of: Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, DC 20006-1238
(202) 303-1135
FAX (202) 303-2000

On Behalf of the Federal Communications
Commission:

GARY SCHONMAN, ESQ.
ELIZABETH YOCKUS MUMAW, ESQ.

Of: Federal Communications Commission
Enforcement Bureau
445 12th Street, SW
Washington, DC 20554
(202) 418-1795
FAX (202) 418-5916

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P R O C E E D I N G S

10:07 A.M.

JUDGE SIPPEL: We're on the record. Good morning, everyone.

I'm going to vary a little bit this morning and ask lead counsel to introduce themselves for the record. We'll do that just once today and also identify those who will be serving on your team who will be participating in the examination.

So let's start with Ms. Wallman.

MS. WALLMAN: Good morning, Your Honor. I'm Kathy Wallman. I represent Herring Broadcasting doing business as WealthTV and I'd like to introduce my colleague, Joshua Rose.

JUDGE SIPPEL: Mr. Rose.

MR. ROSE: Good to meet you, Your Honor.

MS. WALLMAN: And my colleague, Harold Feld.

JUDGE SIPPEL: Mr. Feld.

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1 MR. FELD: Good to meet you, Your
2 Honor.

3 JUDGE SIPPEL: Is that correct,
4 Mr. Feld?

5 MR. FELD: Yes, that's correct.

6 JUDGE SIPPEL: Thank you. And on
7 behalf of the Complainant.

8 MS. WALLMAN: Correct, Your Honor.

9 JUDGE SIPPEL: And let's go down
10 the list as the Defendants appear. Who is the
11 first Defendant? Time Warner.

12 MR. COHEN: Time Warner, Your
13 Honor. Jay Cohen.

14 JUDGE SIPPEL: Mr. Cohen.

15 MR. COHEN: For Time Warner Cable,
16 Mr. Harding next to me.

17 And I think you'll hear from Mr.
18 Carney who is directly behind me, at some
19 point during the proceeding.

20 MR. CARNEY: Good morning.

21 JUDGE SIPPEL: Good morning, good
22 morning, Mr. Carney.

1 So Mr. Cohen, Mr. Harding, good
2 morning. And Mr. Carney. Okay.

3 Now that's Time Warner. The next
4 one is Bright House.

5 MR. BECKER: Bruce Becker for
6 Bright House.

7 JUDGE SIPPEL: Good morning, Mr.
8 Becker.

9 MR. BECKER: I'm all by myself.

10 JUDGE SIPPEL: Mr. Becker is
11 flying solo.

12 (Laughter.)

13 JUDGE SIPPEL: Okay. And who are
14 Cox Communications?

15 MR. MILLS: Good morning, Your
16 Honor, David Mills for Cox Communications.

17 JUDGE SIPPEL: Mr. Mills, good
18 morning.

19 MR. MILLS: You may hear from Lynn
20 Deavers who is sitting behind me as well.

21 MS. DEAVERS: Good morning, Your
22 Honor.

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1 JUDGE SIPPEL: Good morning,
2 ma'am. D-E-A-V-E-R-S?

3 MS. DEEVERS: You got it.

4 JUDGE SIPPEL: What a way to start
5 the day. Okay, and then we've got Comcast.

6 MR. SOLOMON: David Solomon, Your
7 Honor.

8 JUDGE SIPPEL: Mr. Solomon. And
9 with you?

10 MR. SOLOMON: Mr. Tollin.

11 JUDGE SIPPEL: Mr. Tollin, how are
12 you, sir?

13 MR. TOLLIN: Much better.

14 MR. SOLOMON: I have Mr. Lindsay
15 with me who will be participating.

16 JUDGE SIPPEL: Mr. Lindsay, can
17 you spell that for me, please?

18 MR. LINDSAY: L-I-N-D-S-A-Y.

19 JUDGE SIPPEL: I couldn't go two
20 for two. I was on target there.

21 (Laughter.)

22 JUDGE SIPPEL: Okay, and that's

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1 it. Then the Government counsel, on behalf of
2 the Bureau.

3 MR. SCHONMAN: Good morning, Your
4 Honor. Gary Schonman on behalf of the
5 Enforcement Bureau. And my colleague,
6 Elizabeth Mumaw.

7 JUDGE SIPPEL: Ms. Mumaw, good
8 morning.

9 MS. MUMAW: Good morning.

10 JUDGE SIPPEL: Good morning, Mr.
11 Schonman.

12 MR. SCHONMAN: Good morning, Your
13 Honor.

14 JUDGE SIPPEL: Okay. Where we are
15 today is basically a document day, document
16 and admissions day. Excuse me. I know as a
17 preliminary matter that there is pending this
18 motion in limine and it all has to do with Mr.
19 Herring's testimony. I won't go into detail
20 now in terms of -- but basically what's
21 involved is can he testify as an expert with
22 respect to certain matters, either as an

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1 expert or as a lay expert. And I'm going to
2 rule from the bench, but I don't know if I'm
3 prepared to do just yet.

4 I certainly understand what the
5 objections are. And they appear to be very
6 extensive. I guess I've got two concerns.
7 The first concern is how much, if I was to
8 grant the motion, how much of this testimony
9 has to be deleted as opinion? Sometimes,
10 these things cross wires a bit and I'm
11 inclined to want to leave as much in for
12 purposes of letting Mr. Herring tell his
13 story. On the other hand, I have the concern
14 that has been raised with respect to experts.

15 MR. COHEN: Your Honor, may I be
16 heard?

17 JUDGE SIPPEL: Who wants to go
18 first on the motion? Yes, Mr. Cohen.

19 Is that okay, Ms. Wallman?

20 MS. WALLMAN: Yes.

21 MR. COHEN: Your Honor, the
22 Defendants are prepared to have Mr. Herring

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1 tell his story. His story relates to WealthTV
2 and we're not objecting to any part of this
3 testimony for the most part. There are
4 hearsay issues and other issues that perhaps
5 will come up now and perhaps will come up in
6 the course of his oral direct, but that relate
7 to WealthTV.

8 Our principal problem with the
9 testimony is really twofold. One is he is
10 testifying as an expert witness. There have
11 been experts' submissions on the schedule that
12 Your Honor submitted. Wealth's expert reports
13 were due on the 20th of February. In fact,
14 they substituted Ms. McGovern for Mr. Palmer,
15 you will recall, because of Mr. Palmer's
16 illness.

17 JUDGE SIPPEL: Yes.

18 MR. COHEN: Ms. McGovern has
19 offered expert testimony as she was required
20 and she was deposed on a comparison of
21 WealthTV and Mojo. They have an expert, Mr.
22 Turner, who has testified about advertising

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1 thresholds and they have an expert, Mr.
2 Kersey, who is going to testify about the
3 demographics of the network.

4 We have experts who submitted
5 reports on the 27th of February in connection
6 with Your Honor's schedule and order. There
7 was not supposed to be any rebuttal testimony.

8 The problem that we have with Mr.
9 Herring's testimony is not what he has to say
10 about Wealth. It's to the extent he is
11 purporting to make comparisons and to make the
12 arguments that Wealth and Mojo are similarly
13 situated networks. His testimony covers in
14 more detail precisely the areas that his
15 experts cover. He engages in the genre
16 analysis. He rebuts the testimony of our
17 experts which wouldn't have been proper even
18 if he had been an expert and had issued an
19 expert report.

20 So we find all of the comparative
21 testimony which deals with -- of which there
22 were five experts that Your Honor is going to

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1 hear from on both sides. And what we've done
2 is we've color coded the testimony to show
3 Your Honor how it would be deleted because we
4 know it would be difficult to delete and we've
5 made suggested deletions. So that's the first
6 substantial area of problem that we have.

7 The second is Mr. Herring has, by
8 reading newspaper articles, looking at
9 publicly-available sources, opined on the
10 business strategy of iNHD which was what the
11 network was before it was rebranded as Mojo,
12 on Mojo, on the demographics of Mojo. Your
13 Honor, whether he's an expert or a fact
14 witness -- and if he's an expert, he's
15 untimely. And if he's a fact witness, he
16 simply does not have the capacity, the
17 personal knowledge to opine. It is not of any
18 assistance to the Court. It will clutter the
19 record and will lead to an enormously long
20 cross examination in a trial in which we have
21 23 witnesses to get through or 22 witnesses to
22 get through.

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1 Mr. Herring's selective recitation
2 of the public record -- he does not have any
3 first-hand knowledge of Mojo. He didn't work
4 at Mojo. He didn't work at iN DEMAND. He has
5 never had a conversation with any of those
6 folks. So for him to go through materials
7 that are appropriately the subject of cross
8 examination, there will be a Mojo witness.

9 Mr. Asch will be the first
10 Defendants' witness. He was the person at iN
11 DEMAND who was responsible for the
12 transformation of iNHD into Mojo. They can
13 cross examine him with all the things that Mr.
14 Herring is seeking to testify about. But Mr.
15 Herring can't simply -- as we said, it's not
16 a term paper. Just because you put citations
17 to your testimony like footnotes in an
18 academic article, does not turn second-hand
19 testimony into first-hand testimony. We don't
20 know if he even read the articles in real
21 time. But whether he read them
22 contemporaneously or he has pulled these

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1 together, it reads like a brief, Your Honor.
2 And we think it's completely inappropriate.

3 It's also littered with hearsay
4 which we'll deal with both in the course of
5 the documents and his testimony. Mr. Jacobson
6 said this. I found this on the internet. He
7 relies on Mr. Palmer's testimony in his
8 statements. So here he is. We have an expert
9 who has not testified, who has been replaced.
10 He's quoted, cited, and Mr. Palmer's opinions
11 are offered. So we think it's completely
12 inappropriate.

13 We had a process here. The
14 process was the Plaintiffs were required to
15 call their experts. They had Mr. Palmer. He
16 was replaced by Ms. McGovern. Ms. McGovern is
17 going to opine on precisely the matters that
18 Mr. Herring is purporting to opine on. So
19 will the Defendants' experts and the Plaintiff
20 has to make a choice. If it is expert
21 testimony and both parties seem to think that
22 experts are required, but from the beginning

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1 of this case from back in the Media Bureau
2 which is not before you now, but each side has
3 had expert witnesses on the similarity of the
4 program.

5 Again, Your Honor, in the ruling
6 on the DVD set, that's for the experts,
7 whether or not this programming is
8 substantially similar. It's not for me as a
9 fact finder. It's also not for a fact
10 witness.

11 So with due respect to Mr.
12 Herring, we are totally happy to have him tell
13 his story about WealthTV. What is WealthTV?
14 What does he think the demographics are of
15 WealthTV, except to the extent that he is
16 supplementing his expert. What is his
17 programming? What was the nature of the
18 network? What efforts did he make to get
19 carriage on the Defendants' systems? Why he
20 thinks he was denied carriage? What he thinks
21 the appropriate remedy is?

22 But what we're not prepared to

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1 have him do is come in and be an expert after
2 the fact and maybe the best example of that is
3 on page 26 of his testimony where -- 28 of his
4 testimony, excuse me, Your Honor, where he has
5 a paragraph and this is just a good example.
6 "I've read Larry Gerbrandt's declaration."
7 That is Comcast's expert. And he noted
8 several fundamental errors.

9 JUDGE SIPPEL: What page?

10 MR. COHEN: Twenty-eight, Your
11 Honor. The middle paragraph. "I've read
12 Larry Gerbrandt's declaration" and that's just
13 one of many, many examples in this testimony.
14 But I'm giving it as the most graphic example
15 of why this is improper expert testimony.

16 Even their expert could not have
17 come in and given this rebuttal testimony.
18 Your Honor said there would be no rebuttal
19 experts. So what they've done is they've
20 taken a lay witness and they've turned him
21 into a rebuttal expert. And this entire
22 middle section of his report which says this

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1 is Wealth and this is Mojo and this is how he
2 compares is exactly what their experts
3 testified about. It's in rebuttal to what our
4 experts testified about. He can testify that
5 in the bounds of the rules of evidence about
6 WealthTV, but he is not in the position to
7 testify about the similarities and differences
8 in the programming as the subject of expert
9 testimony. It's wrong and even if he were an
10 expert, it's untimely under Your Honor's
11 order.

12 JUDGE SIPPEL: Okay, let me ask
13 this. You took his deposition, correct?

14 MR. COHEN: No, there were no fact
15 witnesses, Your Honor. The experts were
16 deposed. The parties waived fact depositions
17 in this case in the core expedition.

18 JUDGE SIPPEL: Well, did you know
19 he was going to testify?

20 MR. COHEN: Yes, but not about
21 expert matters.

22 JUDGE SIPPEL: Well, no. I'm not

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1 trying to set this up in any way, but
2 normally, even a fact witness gets deposed.

3 MR. COHEN: Yes, but given the
4 expedition here, the parties, we each knew
5 that there would be fact witnesses. We each
6 determined that the parties were to move this
7 along on an expedited basis would waive fact
8 depositions.

9 JUDGE SIPPEL: All right. I take
10 it also that there's just been a lot that went
11 on before this went to hearing. In other
12 words, I'm talking about that complaint phase.

13 MR. COHEN: None of this material.

14 JUDGE SIPPEL: But none of this
15 material --

16 MR. COHEN: None of this material.
17 I mean, Your Honor, this is --

18 JUDGE SIPPEL: But his story you
19 have. You know Mr. Herring's story isn't
20 going to surprise you. I understand the
21 matters you are objecting to is what you
22 didn't expect to see.

1 MR. COHEN: The story is
2 consistent with what he said before. The
3 detailed genre analysis, program by program,
4 rebutting our experts, setting up -- they had
5 an expert witness. Our expectation in good
6 faith was that they would call experts.

7 Mr. Palmer was their expert.

8 JUDGE SIPPEL: I don't want to go
9 down the same road twice. Let me hear from
10 Ms. Wallman, please.

11 MS. WALLMAN: I'm going to ask Mr.
12 Rose --

13 JUDGE SIPPEL: Mr. Rose, is that
14 correct, Mr. Rose?

15 MR. ROSE: That's correct. That's
16 my name.

17 JUDGE SIPPEL: Yes, sir. Okay.
18 I've got your notice of appearance.

19 MR. ROSE: I'm a recent arrival
20 and I apologize. I don't know everything
21 that's happened in the past, but I've tried to
22 bone up on this and I did write the briefs on

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1 this motion.

2 JUDGE SIPPEL: That's okay. Take
3 your time.

4 MR. ROSE: The basic objection the
5 Defendants are making, there are three types
6 of objections. One is that the Rule 701 says
7 that a lay opinion should normally be based on
8 matters within the perception of the lay
9 person. And Rule 602 says there should be
10 foundation of personal knowledge. And the
11 hearsay rule, of course, is similar and that
12 they should be personal knowledge of the
13 information.

14 The objection is therefore bound
15 up in the hearsay rule which is greatly
16 relaxed in the administrative proceedings. As
17 the D.C. Circuit said in a similar proceeding
18 involving EchoStar which was an FCC appeal,
19 there's no support for the claims that
20 uncorroborated and untested testimony and
21 hearsay testimony cannot constitute
22 substantial evidence.

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1 They were going specifically on
2 testimony by an operator, similar to Mr.
3 Herring's. They're summarizing exhibits.
4 They're making the business case that this is
5 my competitor. I consider them my competitor.
6 When I saw the programming I said this is just
7 like my programming.

8 The basic rule, even in Court, a
9 business owner can talk about matters he's
10 learned about within his perception. And
11 perception is expanded even in some Court
12 proceedings that we cite in the papers to
13 include things that experts can also opine on.
14 There's the case of a shipbuilder talks about
15 engineering issues having to do with ships
16 that he learned from building ships and yes,
17 an engineer also knows those things. They are
18 cumulative. They do overlap, but they're
19 matters within his perception and lay
20 witnesses are allow to testify about such
21 things.

22 And Mr. Herring's business case